SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-838

In re CONTINENTAL VENDING MACHINE CORP. and CONTINENTAL APCO, INC.,

Debtors.

JAMES TALCOTT, INC.,

Petitioner,

—v.—

IRVING L. WHARTON, as Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

HARVEY R. MILLER
Attorney for Respondent
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

January 28, 1976

Of Counsel
WEIL, GOTSHAL & MANGES
ALAN B. MILLER, Esq.
PRUDENCE B. ABRAM, Esq.
JOSEPH J. MARCHESO, Esq.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Statutes Involved	3
Statement of the Case	5
ARGUMENT:	
I. The Decision Below is Clearly Correct	9
a. Consolidation Need Not Be Complete or For All Purposes	9
b. The Amended Plan is "Fair and Equitable"	16
II. No Sound Reason Exists For the Granting of the Petition for Certiorari	18
CONCLUSION	23

PAGE

Table of Citations

Cases:

Boehmer v. Pennsylvania R.R. Co., 252 U.S. 496 (1920) 20

Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939) 15, 16, 20-21

Chemical Bank New York Trust Company v. Kheel, 369 F.2d 845 (2d Cir. 1966), affirming In re Seatrade Corporation, 255 F. Supp. 696 (S.D.N.Y. 1966) 10, 15-16, 18-19

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 (1941) 17

Corsicana National Bank v. Johnson, 251 U.S. 68 (1919) 12, 21

In re Eilers Music House, 270 Fed. 915 (9th Cir. 1921) 13

Fitzgerald v. Central Bank and Trust Company, 257 F.2d 118 (10th Cir. 1958) 10

In re Flora Mir Candy Corporation, 432 F.2d 1060 (2d Cir. 1970) 10

Hillebrand v. Sav-Co, 353 F. Supp. 19 (E.D. Ill. 1972) .. 10

Hollander v. Henry, 186 F.2d 582 (2d Cir. 1951) 10

Irving Trust Co. v. Kaminsky, 22 F. Supp. 362 (S.D. N.Y. 1937) 12

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 10

Magnum Import Company v. Coty, 262 U.S. 159 (1923) 22

PAGE

Page v. Arkansas National Gas Corporation, 53 F.2d 27 (8th Cir. 1931) 11
Pepper v. Litton, 308 U.S. 295 (1939) 9, 20
In re Pittsburgh Rys. Co., 155 F.2d 477 (3d Cir.), cert. den. 329 U.S. 731 (1946) 11-12

Reading Co. v. Brown, 391 U.S. 471 (1968) 21

Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) 9-10, 21
SEC v. United States Realty and Improvement Company, 310 U.S. 434 (1940) 16-17
Soviero v. Franklin National Bank of Long Island, 328 F.2d 446 (2d Cir. 1964) 10
Stone v. Eacho, 127 F.2d 284 (4th Cir.), rehearing denied 128 F.2d 16, cert. denied 317 U.S. 635 (1942) .. 10, 13

Taylor v. Standard Gas & Electric Company, 306 U.S. 307 (1939) 10
Trustees System Co. of Pennsylvania v. Payne, 65 F.2d 103 (3d Cir. 1933) 10

United States v. Johnston, 268 U.S. 220 (1925) 20

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946) 21

White v. Cotzhausen, 129 U.S. 329 (1889) 13

Young v. Higbee Company, 324 U.S. 204 (1945) 13

PAGE

Statutes:

Bankruptcy Act
Section 2(a)(2), 11 U.S.C. §11(a)(2) 9
Section 24(c), 11 U.S.C. §47(c) 3
Section 101 et seq., 11 U.S.C. §501 et seq. 2, 5
Section 107, 11 U.S.C. §507 ..... 3, 17-18
Section 216(7), 11 U.S.C. §616(7) 2, 3-5, 17
Section 221(2), 11 U.S.C. §621(2) 2, 3, 16

28 U.S.C. §1254(1) 3

Miscellaneous:

6A Collier on Bankruptcy
(14th Ed. 1972), ¶10.12 16

6A Collier on Bankruptcy
(14th Ed. 1972), ¶11.06 ..... 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-838

In re CONTINENTAL VENDING MACHINE CORP. and CONTINENTAL APCO, INC.,

Debtors.

JAMES TALCOTT, INC.,

Petitioner,

—v.—

IRVING L. WHARTON, as Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

James Talcott, Inc., the petitioner herein, seeks the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") from the order of judgment and opinion issued June 5, 1975 by the Second Circuit (Appendixes A and B to the Petition at A1-A20). The judgment of the Second Circuit affirmed an order of the United States District Court for the Eastern District of New York (the "District Court") entered

August 12, 1974 (Appendix E to the Petition at A23-A29). The August 12, 1974 order of the District Court confirmed the Amended Plan of Reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. §501 *et seq.* for Continental Vending Machine Corp. ("Continental") and its subsidiary, Continental Apco, Inc. ("Apco") proposed by Irving L. Wharton, as Reorganization Trustee, the respondent herein, on June 15, 1970 (the "Amended Plan").

For the purpose of the treatment of unsecured creditors, the Amended Plan provides for the substantive consolidation of the assets and liabilities of Continental and Apco. Secured creditors are given only the specific collateral securing specific indebtedness under the Amended Plan, with an unsecured claim against the consolidated assets for the deficiency, if any. Petitioner, who holds security for its claims against Continental and Apco, objected to confirmation of the Amended Plan on the grounds that the Amended Plan violates the provisions of Section 221(2) of the Bankruptcy Act, 11 U.S.C. §621(2), and Section 216(7) of the Bankruptcy Act, 11 U.S.C. §616(7). The Second Circuit, in the majority opinion of Circuit Judge James L. Oakes, affirmed the District Court's opinion by the Honorable Jacob Mishler, Chief Judge, holding that the Amended Plan is fair and equitable since "the absolute priority of Talcott to the specific assets pledged to it • • • has been preserved," that the Bankruptcy Act "does not require consolidation to be complete for all purposes," and that the so-called "cramdown" provisions of §216(7) of the Bankruptcy Act are inapplicable in the present case.

Jurisdiction

The petition states that jurisdiction is invoked under 28 U.S.C. §1254(1). Although petitioner does not so state, respondent assumes that petitioner also invokes jurisdiction under Section 24(c) of the Bankruptcy Act, 11 U.S.C. §47(c).

Questions Presented

1. Whether the Second Circuit properly held that a reorganization plan which denies a secured creditor the right to elevate and improve its position, at the expense of unsecured creditors, as a result of a substantive consolidation of two debtors' assets and liabilities is nevertheless fair and equitable within the meaning of Section 221(2) of the Bankruptcy Act, 11 U.S.C. §621(2).

2. Whether the Second Circuit properly held that a reorganization plan premised on consolidation may deny a secured creditor the right to elevate and improve its position, at the expense of unsecured creditors, as a result of a substantive consolidation without complying with the so-called "cram-down" provisions of Section 216(7) of the Bankruptcy Act, 11 U.S.C. §616(7).

Statutes Involved

The pertinent provisions of Sections 107 and 221 of the Bankruptcy Act, 11 U.S.C. §§507 and 621, have been set forth in the Petition at pages 2-3. As to Section 216 of the Bankruptcy Act, 11 U.S.C. §616, petitioner has not set forth

at pages 2-3 of the Petition all sections deemed pertinent by respondent. Further there are certain textual errors in the sections set forth in the Petition and, therefore, respondent has deemed it necessary to set forth the relevant provisions of Section 216 at length below.

Section 216 of the Bankruptcy Act, 11 U.S.C. §616:

A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

* * * * *

(6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them;

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by ap-

praisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

* * * * *

(14) may include any other appropriate provisions not inconsistent with the provisions of this chapter.

Statement of the Case

This litigation arises over the confirmation by the District Court of a plan of reorganization for Continental and Apco in their respective reorganization proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C. §501 *et seq.* The reorganization plan in issue is the Amended Plan which was proposed by respondent herein.

Respondent filed the Amended Plan, in part, to assure that petitioner, and any other similarly situated secured creditor, would not obtain an elevated and improved security position as a result of the substantive consolidation of the assets and liabilities of Continental and Apco provided for under the Amended Plan. The order approving the filing of the Amended Plan also provided for consolidation of Continental and Apco. That consolidation will not, in fact, occur until such time as the Amended Plan is finally confirmed. Consolidation was ordered upon the findings, *inter alia,* that there were numerous transfers of funds in an extremely complex pattern between Continental and Apco which depended wholly upon Continental's needs, with little or no heed paid to the needs of Apco; books and records of Continental and Apco were not maintained in a

manner which would permit the accurate reconstruction of all or a substantial portion of the financial transactions between the debtors; and Apco was operated as a division or department of Continental and its business rather than as an independent corporate entity. No testimony or other evidence was introduced reflecting any intercompany transfers to the detriment of secured creditors, including petitioner.

The provisions of the Amended Plan relevant to the Petition are the following: Article I, *Definitions,* provides under the definition of "Claims" that all claims except the claims of secured creditors are to be treated on a consolidated basis. Article II, *Property to be Dealt With By the Plan,* states that all properties of the debtors will be dealt with on the basis of a merger or consolidation, "without prejudice to the rights of Secured Creditors with respect to specific collateral securing specific indebtedness." Article IV-B, *Provisions for the Payment of Secured and Certain Unsecured Creditors,* provides that payment is to be made to creditors in Class 5 (secured creditors) "to the extent that their Claims are secured by specific liens against Property of the Debtors [Continental and Apco] and the proceeds of the sale of such liened Property (the 'Proceeds') are sufficient to satisfy the particular Claims secured by such specific liens, * * * if sufficient Proceeds are not available, Creditors in Class 5 shall become Creditors in Class 7 [general unsecured claims of Senior Creditors] to the extent that their claims as creditors in Class 5 remain unsatisfied. * * * [N]othing in the Plan shall be, or be deemed to be, an elevation or improvement of the status of a Claim filed by any Creditor in Class 5 as a result of the consolidation of the Debtors' Estates."

The petitioner claims that it is the only member of Class 5, that it has not accepted the Amended Plan, and that the above-quoted provisions unfairly discriminate against it. In fact, there are a number of creditors of Continental and Apco who held security for the debts due them, all of whom, with the exception of petitioner, have now been paid, to the extent of the value of the collateral held, as a result of the liquidation of the collateral and many have filed unsecured claims for the balance due them. Petitioner, with the approval of respondent, has liquidated all of the collateral it was holding for advances made to Continental and Apco. After liquidation, petitioner has found that the value of the collateral it held for Continental's debts was less than the amount of the indebtedness due it from Continental; however, petitioner also has found that the value of the collateral it held for Apco's debts exceeded by a substantial margin the amount of the indebtedness of Apco to it. Petitioner continues to hold the proceeds it received from the liquidation of the collateral. Pursuant to an order of the reorganization court, petitioner was directed to file an accounting. The accounting, which is presently proceeding independently of petitioner's objection to confirmation and is not part of this petition, will result in fixing the exact amount of the Apco surplus and the Continental deficit. Petitioner has asserted that the Apco surplus is $380,000 and that the Continental deficit is $820,000. Respondent believes that the accounting will result in an increase of the amount of the Apco surplus, which surplus may be as much as $1,400,000. However, there is no doubt that the accounting will reflect a substantial dollar surplus in the Apco account and a substantial dollar deficit in the Continental account.

As stated in the Petition, petitioner holds both conservator's and trustee's certificates in a substantial amount, see Petition at 4-5. As of this date, certain of these certificates remain unpaid. It is respondent's position in the accounting proceeding referred to above that petitioner should have applied the Apco surplus to certain of the obligations of respondent evidenced by the certificates. Petitioner has asserted in that proceeding that it was not required to make such an application and that it may, instead, set off the Apco surplus against the Continental deficiency as a result of the consolidation. Although the payment of the certificates is part of the overall dispute between petitioner and respondent, the question is not before this court and does not affect the correctness of the Second Circuit's decision.

The indebtedness of Continental and Apco to petitioner is governed by separate, but similar, secured accounts receivable factoring agreements. Both of these agreements provided as follows:

> "You [i.e. petitioner] shall be entitled to hold all sums and all property of the undersigned [i.e., the borrowing corporation], at any time to its credit or in your possession or upon or in which you may have a lien or security interest, as security for any and all obligations of the undersigned at any time owing to you, and/or any company which may now or hereafter be your subsidiary, no matter how or when arising and whether under this or any other agreement or otherwise, and including all obligations for purchases made by the undersigned from any other concern factored by you or such subsidiaries."

Continental was not a party to, nor guarantor of, the security agreement between Apco and petitioner. Likewise, Apco was not a party to, nor a guarantor of, the security agreement between Continental and petitioner. Petition at 5. Thus, in the absence of consolidation, petitioner would not be entitled to apply the Apco surplus against the Continental deficit. Petitioner made numerous advances under both of these security agreements, in all instances taking collateral which it considered satisfactory and sufficient both in type and amount at the time of the advance. Among the collateral held by petitioner for the debt of Continental was the capital stock of Apco.

I

The Decision Below Clearly Is Correct.

a. *Consolidation Need Not Be Complete or For All Purposes.*

The decision of the Second Circuit overruling petitioner's objection to confirmation of the Amended Plan is plainly correct. As the Second Circuit held, the bankruptcy court, which is a court of equity, has the power to consolidate, enabling a bankruptcy court to disregard separate corporate entities. Appendix A to Petition at A6. Further, as the Second Circuit held,

> "In the allowance or disallowance of claims, the court has the equitable power under §2(a)(2) of the Act, 11 U.S.C. §11(a)(2), to make certain that injustice or unfairness does not occur. *Pepper* v. *Litton,* 308 U.S. 295, 308 (1939). Again, 'The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several

> creditors is complete.' *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941)." Appendix A to Petition at A8.

Petitioner concedes that the bankruptcy court has these fundamental equitable powers. Petition at 10.

Consolidation is an equitable doctrine. *Taylor* v. *Standard Gas & Electric Company*, 306 U.S. 307, 322 (1939). Therefore, it is peculiarly appropriate for application by the bankruptcy court, which sits as a court of equity. "[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 240 (1934). Although consolidation may be premised on a state of facts occurring prior to the filing of the bankruptcy petition, no merger of the corporations at law ever takes place. Rather, in the context of the bankruptcy case, and for the purposes of it only, the court determines to pierce the corporate veil for a particular purpose, *Fitzgerald* v. *Central Bank and Trust Company*, 257 F.2d 118, 120 (10th Cir. 1958); *Hollander* v. *Henry*, 186 F.2d 582 (2d Cir. 1951); *Trustees System Co. of Pennsylvania* v. *Payne*, 65 F.2d 103, 107 (3d Cir. 1933) (equity receivership); *Hillebrand* v. *Sav-Co*, 353 F.Supp. 19 (E.D. Ill. 1972), or to treat the assets and liabilities of the corporations together, *In re Flora Mir Candy Corporation*, 432 F.2d 1060 (2d Cir. 1970); *Chemical Bank New York Trust Company* v. *Kheel*, 369 F.2d 845 (2d Cir. 1966); *Soviero* v. *Franklin National Bank of Long Island*, 328 F.2d 446 (2d Cir. 1964); *Stone* v. *Eacho*, 127 F.2d 284 (4th Cir.), *rehearing denied* 128 F.2d 16, *cert. denied* 317 U.S. 635 (1942).

The case of *Page* v. *Arkansas National Gas Corporation,* 53 F.2d 27 (8th Cir. 1931), cited by petitioner at pages 11 and 12 of the Petition, is clearly distinguishable and did not involve consolidation in a Chapter X case. The facts were as follows: A trustee in bankruptcy of an oil leaseholding trust conveyed title to a certain oil lease pursuant to court order. After substantial expenditures were made by the purchaser in getting the well into production, certain creditors asserted that the conveyance was ineffective as the trustee never had title to the lease. The court felt compelled, under these rather unique circumstances, to find an estoppel against the objecting creditors to deny the trustee's title and an implied merger under the terms of the trust instrument. The court resorted to the legal principle of piercing the corporate veil to prevent a windfall to the objectors who had been content to stand back and do nothing until after the purchaser made substantial expenditures. As *Page* and the cases cited above reflect, consolidation is ordered, or a corporate veil is pierced, to prevent fraud or injustice. The facts of this case are clearly distinguishable from *Page.*

It is well settled that a court of equity may recognize the corporate entity in some instances and disregard it in others as equity requires.

> "The effect of a grant of a corporate charter to a group of individuals is described in many ways in figurative language. Perhaps the favorite phrase is the 'corporate veil' which courts are supposed to pierce from time to time as circumstances require. We think a more accurate figure is that of a cloak which on some occasions is to be worn and on other occasions is to be stripped off. To talk legal effect instead of fanciful

> figures of speech, the corporate fiction can be given effect in some instances and with perfect consistency, disregarded in other instances." *In re Pittsburgh Rys. Co.,* 155 F.2d 477, 484 (3d Cir.), cert. den. 329 U.S. 731 (1946).

Accord, Corsicana National Bank v. *Johnson,* 251 U.S. 68, 88 (1919) and *Irving Trust Co.* v. *Kaminsky,* 22 F.Supp. 362, 363 (S.D.N.Y. 1937). The Second Circuit opinion recognizes this principle. Appendix A to Petition at A8.

The Amended Plan acknowledges that recognition of the separate corporate identities of Continental and Apco would be inequitable as to unsecured creditors because Apco was inadequately capitalized and funds were transferred from it depending wholly on Continental's needs. The Amended Plan also recognizes that failure to acknowledge the separate corporate entities as to secured creditors would give a windfall to secured creditors. Thus, the Amended Plan balances the equities between secured and unsecured creditors. However, petitioner asserts that it should be permitted to elevate and improve its security position under the Amended Plan and obtain the windfall benefit of cross-collateralization of the Apco surplus to the Continental deficiency, a right which it does not have under its security agreements.

Both the majority and the dissent in the Second Circuit decision in this case agree that consolidation need not be complete for all purposes. Appendix A to Petition at A8 (majority opinion) and at A16-A17 (dissenting opinion). As the Second Circuit correctly held, consolidation of Continental and Apco for the purpose of the Amended Plan does not preclude the court from determin-

ing that it is inequitable to permit petitioner to obtain a windfall of at least $380,000 and perhaps as much as $1,400,000. Equity looks through and beyond the form of a transaction to its substance. *White* v. *Cotzhausen,* 129 U.S. 329, 341 (1889); *Young* v. *Higbee Company,* 324 U.S. 204, 209 (1945); *In re Eilers Music House,* 270 Fed. 915, 924 (9th Cir. 1921). Equity can and should as in this case prevent its equitable remedy from conferring a windfall.

In assailing the decision of the Second Circuit, petitioner's major premise appears to be that there is a "pre-petition implied merger" when consolidation is ordered in a bankruptcy proceeding and that it was the majority's failure to recognize this fact which caused the Second Circuit to reach an erroneous result. Petition at 11-12. Petitioner contends that the consolidation findings "merely" confirm "the then existing merger which made the debtors one and their assets and liabilities interchangeable." Petition at 12. Respondent believes the authorities just discussed amply refute this argument by petitioner. If there was in fact a "pre-petition implied merger" every time consolidation is ordered, there could be no room for the exploration of equities in favor of a particular creditor, which exploration petitioner urges on this court. See *Stone* v. *Eacho,* 127 F.2d 284 (4th Cir.), *rehearing denied,* 128 F.2d 16, *cert. denied,* 317 U.S. 635 (1942).

Petitioner seeks to suggest several equities in its favor which purportedly were overlooked. The first is its loans to the conservator and to respondent.

> "There is also the equity arising from the fact that 'except for' petitioner's 'large infusion of capital, there might be nothing at all for the unsecured creditors.'" Petition at 11.

The record in these Chapter X cases demonstrates that those loans were, and are, interest-bearing and will be paid in full in these cases. The loans were made by petitioner presumably because petitioner thought the continuation of the businesses of Apco and Continental would assist the petitioner to realize the maximum amounts on the liquidation of its collateral. Nothing suggests that petitioner made these loans out of an altruistic concern for the unsecured creditors. Nor did petitioner bargain for, as consideration for such loans, the treatment it now seeks. None of the cases cited by petitioner suggest that a post-petition event can create an equity in favor of a pre-petitioner creditor to be considered on consolidation. Petitioner further ignores the fact that Chief Judge Mishler, who rendered the District Court opinion herein, was thoroughly familiar with and authorized petitioner's loans to respondent, as these Chapter X cases have been pending before him since 1963 and the District Court evidently did not view the loans as creating such an equity in favor of petitioner that they warranted a windfall of $380,000 or more.

Petitioner also suggests that somehow its liens were diminished or lien property transferred by way of intercorporate dealings and that this too is an unexplored equity in its favor. Petitioner makes much of its offer of proof on its petition for rehearing to the Second Circuit that its lien on the capital stock of Apco owned by Continental "was diminished, in fact destroyed, as a result of manipulation which brought about the demise of both debtors." Petition at 11. This claim is without merit. Chief Judge Mishler ruled on May 20, 1971 that both Continental and Apco are insolvent and that, therefore, stockholders of Continental and Apco "have no claims or interest of any value

in either of the debtors, and their rights are not affected by the Amended Plan." Petitioner's objection to confirmation fails to include any objection to the elimination of the stockholders' positions under the Amended Plan. Furthermore, generalized proof by petitioner that the principals of Continental and Apco ran these corporations into bankruptcy and thereby destroyed the value of the Apco and Continental stock could not elevate the stockholders' position under this court's holding in *Case* v. *Los Angeles Lumber Products Co.,* 308 U.S. 106 (1939) establishing the "absolute priority" rule in corporate reorganizations. See also, 6A *Collier on Bankruptcy* (14th Ed. 1972), ¶11.06, and discussion, *infra.*

Furthermore, petitioner's offer of proof comes too late. Petitioner was given a full and fair opportunity to litigate its claims. Petitioner was present at all hearings at which respondent introduced the evidence on which the consolidation was based and did not ask a *single* question of the witnesses or seek to introduce any evidence of its own. On January 21, 1972, at the hearing on confirmation of the Amended Plan and petitioner's objection thereto, petitioner did not seek to introduce any evidence in support of its position that the Amended Plan should not be confirmed as it was not "fair and equitable" despite full knowledge of respondent's position on the consolidation questions at issue. At no time was petitioner denied the right to introduce any evidence it desired. Petitioner chose to treat the matter solely as an issue of law and should not now be heard to complain that it should have been treated as a question of fact. In this one respect the instant case is very similar to the situation in *Chemical Bank New York Trust Company* v. *Kheel,* 369 F.2d 845 (2d Cir. 1966), in which

none of the persons objecting to consolidation offered any evidence. See the lower court's opinion in that case, *In re Seatrade Corporation,* 255 F.Supp. 696, 697 (S.D.N.Y. 1966). As Circuit Judge Friendly said in his concurring opinion in *Chemical Bank,* "the Government's proof of long continued intermingling of the affairs of the various • • • companies required the Chemical to come forward with at least something more." 369 F.2d at 848-849.

b. *The Amended Plan Is "Fair and Equitable".*

The Second Circuit's decision overruling petitioner's objection to confirmation of the Amended Plan is plainly correct. The Amended Plan is clearly "fair and equitable" within the meaning of Section 221 of the Bankruptcy Act, 11 U.S.C. §621, even though it denies petitioner the right to elevate and improve its position as a result of consolidation, as it accords to petitioner its rights as mandated by the "absolute priority" rule enunciated by this court in *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106 (1939).

> "It is • • • well settled that the words 'fair and equitable' incorporate the rule of absolute priority as between all classes of claimants and security holders; that full compensatory provisions must be made for the entire bundle of rights surrendered by a class; and that any plan which attempts to divert to a junior class values properly allocable to senior classes fails to meet the statutory standard." 6A *Collier on Bankruptcy* (14th Ed. 1972), ¶10.12 at 462.

See also the discussion in 6A *Collier on Bankruptcy* (14th Ed. 1972), ¶11.06; *SEC* v. *United States Realty and Im-*

provement Company, 310 U. S. 434 (1940); and *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510 (1941).

The Second Circuit carefully considered the application of the "absolute priority" rule in the instant case as its opinion reflects:

> "We recognize that • • • [the 'absolute priority'] rule makes a reorganization plan fair and equitable if and only if it provides participation for claims and interests in complete recognition of their strict priorities. 6A Collier, Bankruptcy ¶11.06 at 613 (14th Ed. 1970). But, as we have said, Talcott [the petitioner herein] is obtaining under the amended plan exactly what it bargained for: secured creditor status to the extent that its collateral was adequate. As to the balance of its claim it participates as an unsecured creditor with all the rights of such to the consolidated assets, *i.e.,* it is entitled to go against the Apco surplus as an unsecured creditor of Continental, along with all other unsecured group creditors. The absolute priority rule, as we see it, has therefore been followed." Appendix A to the Petition at A9.

As to the so-called "cram-down" provisions of Section 216(7) of the Bankruptcy Act, 11 U.S.C. §616(7), which petitioner also claims have been violated, the Second Circuit considered this issue so unimportant given its holding on the "fair and equitable" issue that it relegated the issue to a footnote. See Appendix A to Petition at A5-A6, footnote 2. Briefly, Section 216(7) contains certain provisions for the protection of a class of creditors "affected" by a reorganization plan when two-thirds of that class do not accept the plan. Section 107 of the Bankruptcy Act, 11

U.S.C. §507, provides that creditors are deemed to be "affected" by a plan only if their interests are materially and adversely affected thereby.

Under the Amended Plan proposed by respondent, all secured creditors are placed in Class 5; general unsecured claims of senior creditors in Class 7; and stockholders in Class 10; and Article X of the Amended Plan provides that only creditors in Classes 7, 8 and 9 are deemed to be affected. As a secured creditor, petitioner is not "affected" by the Amended Plan within the meaning of Section 107 of the Bankruptcy Act, 11 U.S.C. §607, as its interests are not materially and adversely affected by the Amended Plan as it receives the benefit of all of the specific collateral for which it bargained, but no more. As an unsecured senior creditor of Continental, petitioner is "affected" by the Amended Plan. However, more than two-thirds of the class of unsecured senior creditors who were entitled to vote on the Amended Plan have accepted the Amended Plan. Thus, the "cram-down" provisions are rendered inapplicable.

II

No Sound Reason Exists for the Granting of the Petition for Certiorari.

The decision of the Second Circuit with respect to which petitioner seeks the issuance of a writ of certiorari is the only reported decision of an appellate court on the precise questions involved herein. Petitioner relies heavily on the decision in *Chemical Bank New York Trust Company* v. *Kheel,* 369 F.2d 845 (2d Cir. 1966) and urges at page 8 of the Petition that in the instant case the Second Circuit refused to follow its earlier opinion in *Chemical Bank* even

on the aspects of the failure of the Government in *Chemical Bank* to bargain for the assets of the affiliates and the disadvantage to creditors of the affiliates by consolidation "which are inevitable consequences of every consolidation." The Second Circuit carefully considered petitioner's argument that the *Chemical Bank* decision mandated the result petitioner seeks in this case and held that

> "But *Chemical Bank* did not deal with consensual liens as here; it dealt with the statutory priority. Nothing in *Chemical Bank* suggests that the priority of the United States rested on a lien which attached to the consolidated assets; rather, combining the assets of the related companies simply made more money available for the estate, as to which, to be sure, there was a substantial priority claim." Appendix A to Petition at A7.

Although Circuit Judge Anderson discusses the *Chemical Bank* case in his dissenting opinion, at no point does he assert that the majority opinion is contrary to the holding of the earlier *Chemical Bank* decision. Indeed, he agrees with the majority that

> "[T]he court's power to consolidate is one arising out of equity; that it has the authority under §2(a)(2) of the Act to insure that injustice is avoided; and that it can subordinate claims or adjudicate equities which have as their bases the relationships among the creditors. *Thus, the majority concludes that in the exercise of the bankruptcy court's equity powers it can treat unsecured claims as consolidated and secured claims as not. I agree,* but the majority has failed to demonstrate that equitable considerations justify this result in the

instant case." Appendix A to Petition at A16-A17. (Emphasis added.)

Thus, the difference between the majority and the dissenting opinions is *not* as to the principles of law but merely as to the application of those agreed-upon principles of law to the facts of this case. As Justice Holmes wrote in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts."

Accord, Boehmer v. *Pennsylvania R.R. Co.*, 252 U.S. 496, 498 (1920) ("[T]he rule is well settled that [when the decision depends upon an appreciation of the particular facts presented] * * * where two courts have agreed we will not enter upon a minute analysis of the evidence.") That the majority's application of the law to the facts of this case does not shock the conscience and has not so far departed from the usual and accepted standards of judicial conduct is indicated by the failure of the Second Circuit to grant petitioner's motion for rehearing and the suggestion for rehearing en banc.

There is no conflict among the circuits on the issue presented here. As the Second Circuit said the question is one "really of first impression." Appendix A to Petition at A6. Further, to the extent that the Supreme Court has previously considered the general principles of law underlying the issues in this case, its decisions have been followed and are not in conflict with the decision of the Second Circuit. The Second Circuit relies on a number of important Supreme Court decisions in its opinion—*Pepper* v. *Litton*, 308 U.S. 295 (1939); *Case* v. *Los Angeles Lumber Products Co.*,

308 U.S. 106 (1939); *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215 (1941); and *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946). Appendix A to Petition at A8. Further, the Supreme Court recognized over fifty years ago that a corporation can be respected as a separate entity for some purposes but not for other purposes. *Corsicana National Bank* v. *Johnson*, 251 U.S. 68, 88 (1919).

Nor does the petition raise a significant question in the administration of the Bankruptcy Act, which has not, but ought to be decided by this court, such as was raised in *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968) (Negligence claim against receiver as expense of administration). It is not a case of exceptional importance, as alleged in the Petition on page 9. As the Petition notes, many corporations have subsidiaries and affiliates. Not infrequently, the parent and the subsidiaries or affiliates operate as one large, interrelated business complex. It is also true that there are, and have been, a number of Chapter X and XI cases, as well as straight bankruptcies, in the lower courts encompassed within the Second Circuit involving such related entities. Consolidation has been sought and granted in some of these cases. Remarkably, however, the issue presented here has never before arisen. Respondent submits that the facts here are extremely unusual —a creditor of two related entities holds security for the indebtedness of each which, when liquidated, produces a substantial surplus as to one and a substantial deficit as to the other, *but the creditor has no cross-collateralization agreement or guaranty.* Much more common would be an oversecured position in both or an undersecured position in both and/or a guaranty or cross-collateralization agree-

ment. Thus, this court is being asked to resolve an issue which appears to be of academic interest except for the instant litigant. Respondent submits that it is highly unlikely that this situation will arise in the future as one can safely assume that the attorneys for secured lenders throughout the nation are even now redrafting and modifying their standard secured loan agreements and lending practices so as to protect themselves against the instant situation.

The petition herein is sought only for the particular benefit of petitioner and is not sought to settle any genuine conflict of opinion and authority. As Chief Justice Taft wrote in *Magnum Import Company* v. *Coty,* 262 U.S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Therefore, there exists no sound reason which would favor the issuance of a writ of certiorari to the Second Circuit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HARVEY R. MILLER
Attorney for Respondent
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

January 28, 1976

Of Counsel
WEIL, GOTSHAL & MANGES
ALAN B. MILLER, Esq.
PRUDENCE B. ABRAM, Esq.
JOSEPH J. MARCHESO, Esq.